

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**IN RE: BAY-DELTA PROGRAMMATIC
ENVIRONMENTAL IMPACT REPORT
COORDINATED PROCEEDINGS;**

NO.

**DON LAUB, et al.,
Plaintiffs and Appellants,
v.
JOSEPH GRAHAM (GRAY) DAVIS, et al.,
Defendants and Respondents,**

**REGIONAL COUNCIL OF RURAL COUNTIES, et al.,
Plaintiffs and Appellants,
v.
STATE OF CALIFORNIA, et al.,
Defendants and Respondents,**

**DEPARTMENT OF WATER RESOURCES, et al.,
Real Parties in Interest and Respondents,**

**SAN JOAQUIN RIVER GROUP AUTHORITY, et al.,
Intervenors and Respondents.**

**After Decision by the Court of Appeal Third Appellate District,
Consolidated Cases C044267 and C044577
Appeal from the Superior Court
of the State of California for the County of Sacramento
Judicial Council Coordination Proceedings No. 4152
The Honorable Patricia C. Esgro, Judge**

PETITION FOR REVIEW

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ISSUES PRESENTED

Working for more than five years, eighteen state and federal agencies adopted a 30-year program (the CALFED Program) to improve the water quality, water supply reliability, levee stability and environmental health of the San Francisco Bay and the Sacramento-San Joaquin River Delta. A fundamental purpose of the CALFED Program was simultaneously to address all of four interrelated primary objectives: (1) restore ecosystem quality, (2) improve water supply reliability, (3) improve water quality, and (4) increase levee stability. Reflecting the combined efforts of both federal and state agencies, the work culminated in preparation of the CALFED Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/R).

The Court of Appeal found the PEIS/R inadequate under the California Environmental Quality Act (CEQA) (Pub. Resources Code, §21000 et seq.) for failure to address a project alternative that would reduce exports of water from the Delta to Southern California and for failure to analyze in detail the impacts of sources of water for the Program and a particular future project. The questions presented are:

1. Does CEQA require an environmental impact report to analyze an alternative to a proposed project that fails to achieve a fundamental purpose of the project?
2. Does CEQA mandate that a first-tier environmental impact report on a broad program describe and analyze in detail unapproved potential future projects and sources of water for later stages of the program, or may it provide general analysis, and defer detailed analysis to second-tier environmental documents?

INTRODUCTION

The Court of Appeal's CEQA decision has put at risk an unprecedented effort by eighteen federal and state agencies (CALFED agencies) to create a program designed to solve decades of intractable conflicts over the waters of the Sacramento-San Joaquin River Delta. The Delta is the heart of California's water supply. It provides drinking water for over twenty million people, irrigation water for millions of acres of productive agricultural land, and critical habitat for fish and wildlife. The state's people, environment, and economy - both agricultural and industrial - all rely on the Delta's health and vitality.

Unfortunately, the Delta is being strained to the breaking point by a host of problems that threaten its fragile levees and environment, undermine its water quality, and jeopardize its ability to produce water for current, let alone future, consumptive uses. Recognizing this, the state and federal government agencies with jurisdiction over the Delta came together in the 1990s to develop a program that would address these interrelated problems and ward off a collapse. To analyze the environmental impacts of the program, they prepared the CALFED PEIS/R.

The Court of Appeal's ruling that the PEIS/R is defective puts the CALFED effort to save the Delta in jeopardy. Despite the CALFED agencies' determination that it was necessary to meet all four of the Program's objectives, the court effectively dismisses the legitimacy of the agencies' objective of improving water supply reliability for all users that rely on the Delta. The court holds the agencies should consider an alternative that would cut water deliveries to farms and cities south of the Delta, calling this a reasonable alternative to a planning effort that was

designed to *improve* water supply reliability for farms, cities, and the environment.

In doing so, the lower court created a new *per se* rule regarding the selection of alternatives to be analyzed in an EIR. This rule needs to be reviewed by this Court, because it directly conflicts with this Court's decisions in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights I*) and *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 (*Goleta II*). These cases hold that an EIR's alternatives analysis is governed by a rule of reason and by the facts of a particular case. In contrast, the decision below requires that an alternative must always be studied if it meets most (in our case, three of four) project objectives, even if the objective it fails to meet is fundamental to the agency's project.

The lower court also required a level of detail in the PEIS/R's discussion of sources of water for the Program that conflicts with the Court of Appeal decision in *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351. CEQA encourages "tiering," which means coverage of broad matters in "first-tier" EIRs on general plans and policies with subsequent, more detailed "second-tier" documents on specific projects. *Rio Vista* explained that a first-tier EIR on a broad plan does not need to analyze in detail a potential subsequent, site-specific project, when the broad plan did not commit to that project. Instead, these later specific projects should be considered in a second-tier EIR.

The CALFED PEIS/R is a first-tier report that analyzes a broad and general plan for fixing the Delta, and defers the detailed analysis of specific projects to second-tier EIRs on those projects. The court below, however, has demanded that the first-tier PEIS/R include more specific information

on sources of water and a future second-tier project. As a practical matter, it is not feasible for an agency to provide the level of detail regarding sources of water that the appellate court demands. If left unaltered, the Court of Appeal's decision will discourage agencies from preparing program or tiered EIRs, contrary to the Legislature's instruction that EIRs should be tiered "whenever feasible." (Pub. Resources Code, § 21093.)

Finally, review will enable this Court to comprehensively address the important issue of how CEQA requires a lead agency to identify and evaluate sources of water for a project. This Court has already agreed to review *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, review granted June 8, 2005, S132972. Both these consolidated *CALFED* cases and *Vineyard* involve the question of whether an agency can defer a detailed analysis of uncertain future water supplies for a project. The *CALFED* cases involve a broad-based program that was analyzed at the beginning of the planning process, while *Vineyard* involves a detailed, site-specific project that was analyzed at the end of the planning process. Reviewing the water question in light of these contrasting facts will facilitate the Court's ability to craft a more coherent legal principle.

STATEMENT OF THE CASE

The CALFED Bay-Delta Program is a 30-year plan to resolve intractable problems in the San Francisco Bay and the Sacramento-San Joaquin River Delta (Delta). (C-022752, -784 [CALFED Bay-Delta Program, Final PEIS/R].)¹ The purpose of the Program is twofold: restoring the Bay-Delta's ecological health; and (2) improving water

1. References to the Administrative Record are given with the initial alphanumeric page number of the document, followed by the specific number of the page on which the cited material is found.

management for beneficial uses of the Bay-Delta system. (*Id.*, - 783.)

Eighteen state and federal agencies launched development of the CALFED Program in May, 1995 with a series of public workshops to define the problems of the Delta and to devise potential alternative solutions.

(B-002061.) The CALFED agencies, with input from the public, identified four problem areas and then created four interrelated primary objectives for the Program to address them: (1) restored ecosystem quality, (2) improved water supply reliability, (3) improved water quality, and (4) increased levee stability. (C-022752, -780 to 788.) The agencies determined that

"important physical, ecological, and socio-economic linkages exist between the problems and possible solutions in each of these categories."

(*Id.*, -785.) Each of the four objectives must be met to achieve the project's underlying purpose. (*Id.*, -784.)

The CALFED agencies conducted a lengthy alternatives selection process, with extensive public input, to choose the alternatives to the preferred project that would be analyzed in detail in the PEIS/R. (C-022752, -791 to 94; see also Slip Opinion (Slip Op.), pp. 35-38, attached as Attachment A.) The CALFED agencies prepared a first Draft PEIS/R in March 1998 (C-005125 to 786) and a second Draft PEIS/R in June, 1999. (C-017254 to 018499.) As CEQA lead agency, the Resources Agency certified the Final PEIS/R and made the findings required by CEQA, in August, 2000. (A-000120 to 265 [CEQA Findings].) The federal agencies approved a Record of Decision under the National Environmental Policy Act at the same time, which the Secretaries for the California Resources Agency and the California Environmental Protection Agency also signed. (A-000002, -89 [Record of Decision].)

The draft and final EIRs were prepared as first-tier, program EIS/EIRs addressing the entire CALFED Program at a programmatic level. (C-022752, -756, -784.) The CALFED Program included literally hundreds of potential future activities. (See, e.g. C-025237, -298 [Ecosystem Restoration Program].) The CALFED solution area, the area in which activities could contribute to a resolution of the problems in the Delta, covered two thirds of the State of California. (C-022752, -788 to 791, -3896.)

The Final PEIS/R states that the CALFED Program was to be the "planning road map" for achieving the CALFED agencies' purposes. (*Id.*, -2784.) It explains that the preferred project, that is, the overall Program, will not authorize specific project construction. Instead, the Program will set the long-term, overall direction of the CALFED agencies. (*Id.*, -2756.) Subsequent actions must be developed in compliance with CEQA and the National Environmental Policy Act, as appropriate. (*Ibid.*) The Resources Secretary's CEQA findings confirm that no site-specific projects were being approved. (CEQA Findings, A-000120, -123.)

Following the Resources Agency's certification of the Final PEIS/R on August 28, 2000, three separate petitions for writs of mandate were filed and were coordinated as Judicial Council Coordination Proceeding No. 4152. The writ petition filed by the Municipal Water District of Orange County was dismissed. The two remaining cases, *Laub v. Davis*, Super. Ct. Fresno County, 2003, No. 00CECG11667 and *Regional Council of Rural Counties v. State of California*, Super. Ct. Sacramento County, 2003, No. 00CS01331, both involved CEQA challenges to the CALFED Bay-Delta Program Final PEIS/R. The *Regional Council of Rural Counties* case also involved several non-CEQA claims, which are not an issue in this petition

for review. On April 1, 2003, the trial court ruled on the CEQA claims in the coordinated proceeding, rejecting all of petitioners' arguments and concluding that the PEIS/R satisfied the requirements of CEQA.

On October 7, 2005, the Third District Court of Appeal issued its lengthy decision, affirming most of the trial court's decision. The court also held, however, that the CALFED PEIS/R was inadequate on three grounds: (1) the PEIS/R failed to analyze an alternative that would reduce exports of water from the Delta to Southern California; (2) the PEIS/R failed to include an adequate discussion of diverting water from various potential sources for environmental purposes under the CALFED Program; and (3) the PEIS/R should have contained greater detail about the Environmental Water Account (an innovative program for managing water in a way that would protect fish without reducing water supply to entities that export water from the Delta). (Slip Op., p. 5.) This petition concerns only these discrete portions of the Court of Appeal's decision.

The state parties, intervenor Metropolitan Water District of Southern California and certain other real parties in interest filed timely petitions for rehearing. The Court of Appeal issued an Order Modifying Opinion and Denying Rehearing that did not change the judgment on November 2, 2005. (Attachment B.) The Court of Appeal's decision became final on November 6, 2005. The state parties now file this timely petition for review.

REASONS FOR GRANTING REVIEW

I.

REVIEW IS NECESSARY BECAUSE THE LOWER COURT'S RULING GOVERNING REVIEW OF AN ENVIRONMENTAL IMPACT REPORT'S ALTERNATIVES ANALYSIS IS INCONSISTENT WITH PRIOR RULINGS OF THIS COURT.

This Court should grant review to clarify that CEQA does not require a lead agency to evaluate alternatives that would defeat a proposed project's fundamental objective. This Court's decisions in *Laurel Heights I*, *supra*, 47 Cal.3d 376, and *Goleta II*, *supra*, 52 Cal.3d 553, hold that an EIR's alternatives analysis is governed by a rule of reason and the facts of a particular case. The Court of Appeal in the CALFED decision sets out a contrary per se rule: that an alternative must be studied if it meets most project objectives, even if it fails to meet a lead agency's fundamental and necessary objective. A lead agency's reasons for narrowing its range of alternatives will be irrelevant. And the new rule impinges on the lead agency's discretion to decide what project objectives are so fundamental that an alternative which defeats them is not reasonable or feasible.

A. The Lower Court's Decision Is Inconsistent With This Court's Decisions in *Laurel Heights I* and *Goleta II* Because it Would Abandon the "Rule of Reason" and Fact Specific Evaluations of Alternatives, and Replace Them With a Per Se Test.

The Court of Appeal held that the Resources Agency must consider a reduced export alternative, even though the Agency concluded this alternative would fail to meet a fundamental objective of the CALFED Program. (Slip Op., pp. 152-159.) The Court of Appeal acknowledged

that the Resources Agency determined it was necessary to meet *all four* of the basic CALFED Program objectives for an alternative to be feasible. (*Id.* at pp. 141, 143.) But the Court disregarded the Resources Agency's rationale. "CALFED's rejection of a reduced exports alternative is premised on the false assumption that, for an alternative to be feasible, it must meet all of the Program's goals." (*Id.* at p. 155.) The Court interpreted CEQA Guidelines section 15126.6 to require study of reducing water exports to farms and cities south of the Delta because it could meet "most" of the CALFED Program objectives, even though it could not meet the agencies' fundamental objective of improving water supply reliability. (*Id.* at p. 159.)²

The Court of Appeal's interpretation of Guidelines section 15126.6 sets up a per se rule for alternatives that is contrary to the rules this Court established in *Laurel Heights I* and *Goleta II*. In *Laurel Heights I*, this Court explained that the range of alternatives is governed by a rule of reason. (*Laurel Heights I, supra*, 47 Cal.3d at p. 407.) "One of [an EIR's] major functions . . . is to ensure that *all reasonable alternatives* to proposed projects are thoroughly assessed by the responsible official." (*Id.* at p. 400, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197; emphasis in original.) In *Goleta II*, the Court further explained that a reviewing court must evaluate each case on its facts, in light of the statutory purpose. (*Goleta II, supra*, 52 Cal.3d at p. 566.)

2. The CEQA Guidelines are located at Title 14, California Code of Regulations, section 15000 et seq., and will be referred to herein as the "CEQA Guidelines" or "Guidelines."

While section 15126.6 can be harmonized with the rule of reason and a fact-specific evaluation of alternatives, the Court of Appeal's interpretation of section 15126.6 dispenses with these important principles. In their place is a rigid, per se test for evaluating the range of alternatives in an EIR. Even if a lead agency has a legitimate rationale supported by substantial evidence for narrowing its range of alternatives, it must still study an alternative that would meet "most" of the basic project objectives. (Slip Op., pp. 155-156.) The lead agency's rationale for eliminating an alternative, no matter how compelling, would be immaterial. Review is therefore necessary to prevent the establishment of this unprecedented and unreasonable per se rule for evaluating the alternatives analysis in an EIR.

B. If Review is Not Granted, the Decision Below Will Usurp the Discretion of Agencies to Determine Their Objectives and Their Projects' Underlying Purposes.

Under CEQA, the selection of a project and its objectives is a task for the lead agency. (CEQA Guidelines, § 15124, subd. (b).) In setting forth the project objectives, the lead agency must identify "the underlying purpose of the project." (*Id.*) The range of alternatives studied in the EIR is necessarily delimited by the underlying purpose the lead agency is trying to serve. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 745 [alternatives analysis for Port project not defective because it was structured around Port's "needs or desires to handle more commercial shipping"]; *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 416-417 [alternatives analysis for development plan project not defective because it was structured around city's growth management program].)

The CALFED agencies identified four primary objectives for the CALFED Program: restored ecosystem quality, improved water supply reliability, improved water quality, and increased levee stability. (C-022752, -780 to 88.) Prior efforts to fix the Bay-Delta's problems with more narrow objectives had consistently failed. (*Id.*, -779 to 80, C-023926, -943 to 944.) The agencies therefore determined that, to have any project at all, it was necessary to meet all four objectives concurrently. (C-022752, -784; C-023926, -943.)

Early in the CEQA process, the CALFED agencies seriously considered whether it would be possible to achieve their objectives with a plan that would reduce or cap exports of water to farms and cities south of the Delta. (C-027485, -529 [Final PEIS/R Responses to Comments].) Based on public comments, scientific evidence, and economic information, the agencies determined that cutting Delta water supplies to a large portion of the State's farms and people would defeat the water supply reliability objective. (*Ibid.*) The agencies thus declined to study this alternative in the PEIS/R. (*Ibid.*)

The Court of Appeal's reading of CEQA Guidelines section 15126.6 improperly intrudes on the Resources Agency's discretion to determine that all four objectives must be met for an alternative to be a reasonable or feasible alternative to the proposed project. The court's new per se test allows a reviewing court to jettison one or several of a lead agency's project objectives and order the study of alternatives that may defeat a lead agency's underlying project purpose, on the theory that the alternative could still meet "most" objectives. (CEQA Guidelines, § 15124, subd. (b).) This is precisely what the Court of Appeal did here, interjecting the question of whether less water should be exported to areas in Southern

California under the guise of a CEQA alternative. This results in utter disregard for a lead agency's determination about which project objectives are or are not dispensable in the process of developing alternatives.

The lower court's per se test also conflicts with CEQA cases recognizing that the project alternatives considered in an EIR must be able to meet the project's underlying purposes, as defined by the lead agency. In *Federation of Hillside and Canyon Assoc. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, for example, the Second District Court of Appeal cited this Court in stating that the alternatives discussion should "focus on alternatives that could substantially reduce or avoid one or more of the significant environmental effects *while still serving the project's fundamental objectives.*" (*Id.* at p. 1264 citing *Goleta II, supra*, at p. 566 and *Rio Vista, supra*, at p. 378, emphasis added.)

In *Save San Francisco Bay Assoc. v. San Francisco Bay Conservation and Development Comm.* (1992) 10 Cal.App.4th 908, the First District Court of Appeal upheld an EIR's alternatives analysis for an aquarium project. The Court held there was substantial evidence to support the need for a waterfront location for the aquarium. (*Id.* at p. 924.) The Court therefore found no impropriety in the alternatives analysis that excluded upland locations on the grounds they would not meet the basic project purpose. (*Id.* at pp. 925-928.) And in *Goleta II*, this Court upheld an alternatives analysis that evaluated only one off-site alternative for a beach-front hotel, and that specifically declined to evaluate inland locations because they would not meet the project objective of having an oceanfront project. (*Goleta II, supra*, 52 Cal.3d at pp. 560-561, 566, 570-576.)

Review is necessary to prevent the lower courts from usurping the role of the lead agency to set reasonable project objectives, and to determine that certain objectives are necessary for an alternative to be reasonable and feasible.

II.

REVIEW IS NECESSARY BECAUSE THE RULE ENUNCIATED BY THE THIRD APPELLATE DISTRICT CONFLICTS WITH RULINGS OF THE FIRST AND SECOND APPELLATE DISTRICTS AND THE LEGISLATURE'S POLICY ENCOURAGING TIERING.

The decision below undermines the central procedures that the Legislature has directed agencies to utilize to reduce the level of detail in an EIR analyzing broad policy decisions: tiering. Tiering is "the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs. . . ." (CEQA Guidelines, § 15385.) The Legislature has declared that "tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review. . . ." (Pub. Resources Code, § 21093, subd. (a).) Tiering is particularly appropriate for a "program EIR," which may be prepared for a series of actions that can be characterized as one large project and that are related in specified ways. (CEQA Guidelines, § 15168, subd. (a).) Program EIRs allow the lead agency to consider "broad policy alternatives and program-wide mitigation measures at an early time." (*Id.*, § 15168, subd. (b).)

By demanding that the CALFED PEIS/R provide too great a level of detail in analyzing the impacts of providing water for the Program, the Court of Appeal decision conflicts with the key case involving a similarly

general and limited first-tier program EIR: *Rio Vista Farm Bureau Center v. County of Solano*, *supra*, 5 Cal.App.4th 351. The decision also negates the very purpose of tiering, and makes it infeasible on large, broad programs such as CALFED.

A. The Court of Appeal's Opinion Conflicts With the First District's Decision in *Rio Vista Farm Bureau Center*.

The Resources Agency specifically modeled the CALFED PEIS/R on the direction provided in *Rio Vista Farm Bureau Center v. County of Solano*, *supra*, 5 Cal.App.4th 351, the seminal CEQA decision outlining the requirements for a first-tier EIR that analyzes a broad plan. (CEQA Findings, A-000120, -134.) *Rio Vista* held that the first-tier EIR for a County's broad waste management plan only needed to analyze the plan's impacts in general terms, where the EIR expressly left more detailed analysis to future EIRs reviewing specific projects as they are developed. The court stressed that the broad plan before it "merely serves as a hazardous waste management assessment and overview, with any separate future projects, when identified, to be accompanied by additional EIRs." (*Rio Vista*, *supra*, at p. 372.) As a result, the first-tier EIR only needed to analyze the plan's impacts in "general terms." (*Id.* at p. 375.) The court held that the County "properly defer[red] more specific environmental reviews" to the actual project stage. (*Ibid.*)

In sharp contrast, the decision below requires that the CALFED Program's first-tier PEIS/R provide the level of specificity concerning water sources that would normally be required for a second-tier report. For example, the lower court faults the CALFED agencies for deferring selection or environmental review of specific water storage projects. (See Slip Op., pp. 121, 114.) In addition, the court does not accept as adequate

the PEIS/R's statement that given the uncertainties regarding the availability of water in California, "CALFED believes it must continue to evaluate and implement a broad range of water management options to achieve the Program's objectives," including new storage, an aggressive water conservation program, recycling, and fostering a water transfer market. (*Id.*, p. 115.) By requiring the CALFED agencies to provide a greater level of detail concerning the sources of water and their impacts, even though the project was a broad multi-decade plan, and specific activities were not approved, the Court of Appeal decision conflicts with *Rio Vista*. A resolution of that conflict by this Court is needed to avoid confusion and to give guidance to agencies that seek to use tiering for broad planning projects in the future.

B. The Court of Appeal's Decision Also Conflicts With the Legislature's Requirement That Agencies Tier Whenever Possible.

In addition, although the Legislature has called for the use of tiering "whenever feasible" (Pub. Resources Code, § 21093, subd. (b)), the decision below requires that a first-tier EIR for a broad plan contain a level of detail that is impracticable, and will therefore undermine the use of tiering. The court faults the PEIS/R for not disclosing the sources of water for the CALFED Program (Slip Op., pp. 77, 113, 115, 120-121), but the decision itself shows that the major sources were disclosed at a general level: for example, water could be provided through better water use efficiency (*id.*, p. 105), acquisitions from willing sellers (*id.*, p. 113), and new groundwater and surface water storage (*id.*, p. 114). The court decided that more specificity was required – describing not just water

transfers from particular areas, but transfers from particular sellers; not just water storage, but particular water storage projects. (*Id.*, p. 114, 121.)

But this is to demand the impossible. The agencies cannot predict which sellers will transfer water 20 years from now. By requiring this level of detail, the lower court is essentially determining that agencies cannot practically use tiering in most cases. Under the court's decision, unless a report can provide a project level of specificity, it is inadequate. This is contrary to the approach sanctioned by Guidelines section 15152, subdivision (c). It will discourage agencies from conducting environmental analysis on early planning activities, making it more likely that they will rely on the statutory exemption for planning studies. (CEQA Guidelines, § 15262.) It will also inhibit the use of program EIRs. (*Id.*, § 15168, subd. (a).)

Further, the decision will create uncertainty and confusion because, although the court determined that a greater level of detail was necessary, it did not specify what level is required. The CALFED solution area covered two thirds of the State. (C-022752, -788 to 91, -3896.) Environmental impacts of the CALFED Program were analyzed by resource topic (including water supply and water management, water quality, fisheries and aquatic systems, vegetation and wildlife, agricultural land and water use). (*Id.*, -757 to 759 [Final PEIS/R, Table of Contents].) Impacts for each resource category were discussed at a regional level of detail for the five CALFED geographic regions: the Sacramento Valley, the San Joaquin Valley, the Delta, the Bay, and Southern California. (C-022876 through 023729 [Final PEIS/R chapters 5-7].) Under the court's reasoning, must the analysis be by county? By specific sites? To require more detail in EIRs on broad plans covering very large geographic areas would require

the agencies to speculate, would burden already massive EIRs with meaningless detail, and would make EIRs longer without increasing their usefulness as decision documents.

In *Laurel Heights I*, *supra*, 47 Cal.3d 376, this Court explained that the level of specificity required in an EIR is subject to the "rule of reason." (*Id.* at p. 407.) This Court should grant review to clarify that where the first-tier project is a broad program or plan, which will not result in the approval of specific projects, the level of detail regarding sources of water should be determined by the nature of the plan. Courts should not require detail that it is not feasible to produce.

C. The Court of Appeal's Requirement That Agencies Update First-Tier EIRs with Details Regarding Second-Tier Projects as They Are Developed Is Inconsistent with the Ruling of the Second District in *Al Larson Boat Shop*.

The court below held that the first-tier CALFED PEIS/R must include detailed information on, and by implication analyze in detail, the Environmental Water Account, a second-tier project the CALFED agencies continued to refine during the year-long period between release of the Draft PEIS/R and issuance of the Final EIS/R. This ruling is inconsistent with the ruling in *Al Larson Boat Shop*, *supra*, 18 Cal.App.4th 729. A lead agency using tiering has discretion to focus a first-tier EIR for a general planning project on only the general planning project, and leave project-level details to the time when actual projects are being considered for approval. (*Ibid.* [first-tier EIR on plan for port did not have to include detailed analysis of alternatives to anticipated site-specific projects, which were the subject of their own site-specific EIRs].)

Moreover, the lower court's requirement is impracticable. Where a first-tier CEQA project is a broad program or plan, the lead agency frequently continues to develop information about future second-tier projects while the umbrella program is being analyzed. If the court's decision is not altered, lead agencies would be required to continually redraft program EIRs whenever more detail becomes known about specific second-tier projects. As a result, agencies would never finish the umbrella EIR, because they would be forced into an unending cycle of redrafting and recirculating as subsequent specific projects become better defined.

III.

THE COURT SHOULD GRANT REVIEW TO STATE A RULE REGARDING ANALYSIS OF FUTURE SOURCES OF WATER SUPPLY. IT HAS ALREADY GRANTED REVIEW OF THIS ISSUE IN A DIFFERENT CONTEXT IN *VINEYARD AREA CITIZENS FOR RESPONSIBLE GROWTH V. CITY OF RANCHO CORDOVA*.

Both the *CALFED* cases and *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2005) 127 Cal.App.4th 490, review granted June 8, 2005, S132972, present a similar CEQA issue - whether an agency can defer a detailed analysis of the impacts of uncertain future water supplies for a project—but in different factual contexts. This issue is both important and recurring. (E.g., *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182.) The Court can shape the law more coherently by deciding the *CALFED* cases together with *Vineyard*.

Vineyard poses the question of analyzing water sources for a project in the context of a detailed, site-specific project at the tail end of both the planning process and the CEQA process. A local agency approved a specific plan for a specific project at a specific location that sets forth lots, land uses, streets, bike paths, densities, parks, schools, and infrastructure, but without identifying precisely the sources of water for the latter stages of the project. The agency argues that it identified and discussed several *potential* sources of water in its EIR, but that it was not required to do more at this time because the plan requires the agency to identify a specific source of water before it grants final approvals necessary for actual construction. The petitioner claims the local agency's approach obfuscates the true environmental effects of the project.

The *CALFED* cases pose the same question about analyzing water supplies, but at a different point in the planning process. The CALFED Program and its first-tier EIR are so general and limited that they mark the beginning of the planning and environmental review process, not the end. No decisions have been made on site-specific projects that will require water. The projects, their water supplies, and alternatives that may reduce water supply impacts can be considered in detail in future, site-specific EIRs. Consistent with the rules for tiering, however, the CALFED PEIS/R properly discusses potential water supplies at a general level of detail that is commensurate with the general program being approved; when site-specific projects are proposed in the future, the public can consider those projects, their water supplies, and project alternatives in detailed, second-tier EIRs. (See CEQA Guidelines, §§ 15152 and 15385.)

California agencies need the flexibility to adopt broad policies that affect water without having to provide the sort of detailed analysis of water

supplies that would be appropriate for a residential subdivision. By considering the *CALFED* cases together with *Vineyard*, the Court can define a coherent set of principles to guide lower courts and agencies on this important issue.

CONCLUSION

For the reasons given above, the state parties respectfully request that the Court grant review of these cases.

Dated: November 15, 2005

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**CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULES 25(b)(3), 14(c))**

I hereby certify that:

Pursuant to California Rules of Court, Rules 25(b)(3) and 14(c), in reliance upon the word count feature of the software used, I certify that the attached STATE RESPONDENT'S PETITION FOR REVIEW contains 5889 words.

Dated: November 15, 2005

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